RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY 25 2017
OFFICE OF THE CLERK

No. 16-1215

In the Supreme Court of the United States

LAMAR, ARCHER & COFRIN, LLP,

Petitioner,

v.

R. SCOTT APPLING,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
JONATHAN WEINBERG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Respondent

TABLE OF CONTENTS

Page

Table of Authorities ii
Statement 1
A. Legal background. 2
B. Factual background. 3
C. Proceedings below 6
Reasons for Denying the Petition 9
A. Review is premature 9
B. The decision below is correct. 12
1. The statutory text. 12
2. The legislative purpose. 18
3. The statutory history. 24
C. This is a poor vehicle for review 27
Conclusion 30

TABLE OF AUTHORITIES

Cases

Albinak v. *Kuhn*,
149 F.2d 108 (6th Cir. 1945) 25

Bandi v. *Becnel* (*In re Bandi*),
683 F.3d 671 (5th Cir. 2012) 11, 12, 13

Bullock v. *BankChampaign, N.A.*,
133 S. Ct. 1754 (2013) 18

In re Butler,
425 F.2d 47 (3d Cir. 1970) 26

Cadwell v. *Joelson* (*In re Joelson*),
427 F.3d 700 (10th Cir. 2005) 11, 13, 19, 27

Cent. Tr. Co. v. *Official Creditors' Comm. of Geiger Enters., Inc.*,
454 U.S. 354 (1982) 19

County of Allegheny v. *ACLU*,
492 U.S. 573 (1989) 14

Dial Fin. Co. v. *Duthu*,
188 So. 2d 151 (La. Ct. App. 1966) 26

Duncan v. *Walker*,
533 U.S. 167 (2001) 13

Field v. *Mans*,
516 U.S. 59 (1995) ..... *passim*

FMC Corp. v. *Holliday*,
498 U.S. 52 (1990) 17

Haler v. *Boyington Capital Grp., LLC*,
2017 WL 434357 (E.D. Tex. 2017) 12

Haler v. *Boyington Capital Grp., LLC*,
No. 17-40229 (5th Cir.) 12

TABLE OF AUTHORITIES—continued

Page(s)

Ingersoll-Rand Co. v. *McClendon*,
498 U.S. 133 (1990) 17

In re Johannessen,
76 F.3d 347 (11th Cir. 1996) 28

In re Kim,
163 B.R. 157 (B.A.P. 9th Cir. 1994) 28

In re Kim,
62 F.3d 1511 (9th Cir. 1995) 28

Land Investment Club, Inc. v.
Lauer (*In re Lauer*),
371 F.3d 406 (8th Cir. 2004) 10

Lemon v. *Kurtzman*,
403 U.S. 602 (1971) 14

Local Loan Co. v. *Hunt*,
292 U.S. 234 (1934) 2, 18

Locke v. *Milner* (*In re Locke*),
205 B.R. 592 (B.A.P. 9th Cir. 1996) 29

Lorillard v. *Pons*,
434 U.S. 575 (1978) 26, 27

Merrill Lynch, Pierce, Fenner & Smith, Inc.
v. *Curran*,
456 U.S. 353 (1982) 26

Morales v. *Trans World Airlines, Inc.*,
504 U.S. 374 (1992) 16, 17

Mwangi v. *Wells Fargo Bank, N.A.* (*In*
re Mwangi),
764 F.3d 1168 (9th Cir. 2014) 19

TABLE OF AUTHORITIES—continued

Page(s)

Ojeda v. *Goldberg*,
599 F.3d 712 (7th Cir. 2010) 28

Pilot Life Ins. Co. v. *Dedeaux*,
481 U.S. 41 (1987) 17

Presley v. *Etowah County Commission*,
502 U.S. 491 (1992) 14

Puerto Rico v. *Franklin Cal. Tax-Free Tr.*,
136 S. Ct. 1938 (2016) 12

Ransom v. *FIA Card Servs., N.A.*,
562 U.S. 61 (2011) 12

Schwab v. *Reilly*,
560 U.S. 770 (2010) 19

Shah v. *Chowdaury* (*In re Chowdaury*),
2014 WL 2938274 (B.A.P. 9th Cir. 2014) 28

Shainman v. *Shear's of Affton, Inc.*,
387 F.2d 33 (8th Cir. 1967) 25, 26

Shawmut Bank, N.A. v.
Goodrich (*In re Goodrich*),
999 F.2d 22 (1st Cir. 1993) 29

Siriani v. *Nw. Nat'l Ins. Co.* (*In re Siriani*),
967 F.2d 302 (9th Cir. 1992) 30

Tenn v. *First Hawaiian Bank*,
549 F.2d 1356 (9th Cir. 1977) 26

Wolf v. *Campbell* (*In re Campbell*),
159 F.3d 963 (6th Cir. 1998) 29

TABLE OF AUTHORITIES—continued

Page(s)

Statutes, Rules and Regulations

11 U.S.C.
§ 101(32)(A) 15
§ 523(a)(2) 2, 24, 27
§ 523(a)(2)(A) 2, 3, 6, 21
§ 523(a)(2)(B) ..... *passim*

Act of May 27, 1926, § 6,
44 Stat. 662 24

Pub. L. No. 86-622, 74 Stat. 409 (1960) 25

Pub. L. No. 95-598, 92 Stat. 2549 (1978) 24

Other Authorities

124 Cong. Rec. H11089 (Sept. 28, 1978) 27

H.R. Rep. No. 595, 95th Cong., 1st Sess.
130, 1978 U.S.C.C.A.N. 5787 (1977) 22, 23, 27

Restatement (Second) of Torts § 537 (1977) 28

S. Rep. No. 989, 95th Cong.,
2d Sess. 78 (1978) 27

Webster's New Twentieth Century Dictionary (2d ed. 1967) 14

Webster's Third New International Dictionary (1981) 14, 16

STATEMENT

The court of appeals properly concluded that, because the term "respecting" "is defined broadly as 'with regard or relation to; regarding; concerning,'" "the phrase 'statement *respecting* the debtor's ... financial condition' includes a statement about a single asset." Pet. App. 8a (alteration adopted; quotations omitted). "[A] statement can 'respect' a debtor's 'financial condition' without describing the overall financial situation of the debtor." *Ibid.* Review of that determination is unwarranted.

First, the decision below focused on the role that the term "respecting" plays in the statutory text. Pet. App. 8a. No court of appeals has rejected this argument. Until one does, review is premature.

Second, the lower court's construction of the statute, firmly grounded in the words that Congress actually used, is correct. This Court consistently holds that the word "respecting," like other analogous terms, has a broadening effect on the phrase it modifies. The Court repeatedly rejects arguments, indistinguishable from petitioner's here, that it should disregard these words.

Not only is this construction compelled by the statute's text, but it is "also perfectly sensible." Pet. App. 13a. By subjecting a greater range of debts to the requirements of Section 523(a)(2)(B), this interpretation incentivizes written instruments. That promotes accuracy from the start, and it avoids saddling bankruptcy courts with the burdensome and error-prone task of reconstructing oral conversations that occurred years or decades earlier. This interpretation is also necessary to give effect to Congress's

express goal of safeguarding against certain abusive credit practices.

Third, review is unwarranted because the outcome of this case is very unlikely to turn on the question presented. The court of appeals held that Section 523(a)(2)(B) applies, and thus petitioner's claim fails because the alleged misrepresentations were not made in writing. But, even if Section 523(a)(2)(A) controls instead, petitioner's claim still would fail because it relies on a theory of damages that is contradicted by the common law.

For all of these reasons, review should be denied.

A. Legal background.

The Bankruptcy Code provides a path by which a debtor may have his or her debts discharged and thereby receive "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934). But the Code's policy of a fresh start has exceptions.

In particular, 11 U.S.C. § 523(a)(2) exempts from discharge certain debts obtained by fraud:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement

respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive.

By its terms, subsection (2)(A) applies to all forms of fraud, "other than a statement respecting the debtor's * * * financial condition." Subsection (2)(B), by contrast, applies to a "statement * * * respecting the debtor's * * * financial condition."

Subsection (2)(A) differs from subsection (2)(B) in certain respects. Subsection (2)(A) applies to representations made orally or in writing, and it requires a showing of justifiable reliance. See *Field* v. *Mans*, 516 U.S. 59, 61 (1995). Subsection (2)(B), by contrast, is limited to a "statement in writing," and it requires proof that the creditor "reasonably relied" on that written statement. *Id.* at 65, 66.

B. Factual background.

In 2004, respondent R. Scott Appling purchased a Georgia business that manufactured seating components. Pet. App. 21a. During that transaction, he was defrauded. *Ibid.*

Struggling to keep the business afloat, respondent retained a law firm, petitioner Lamar, Archer & Cofrin, LLP, to seek legal redress from the sellers. Pet. App. 21a. Over the course of the representation, respondent paid significantly more than a hundred thousand dollars in fees. Bankr. Ct. Doc. 66, at 155. Nevertheless, respondent eventually fell behind on his mounting legal bill, and, by March of 2005, he owed petitioner more than $60,000. Pet. App. 21a.

On March 16, 2005, petitioner threatened to terminate its representation due to the outstanding fees. The parties, along with local counsel Walter Gordon, met to discuss the situation on March 18, 2005. Pet. App. 22a.

At the bankruptcy trial—nearly a decade later in September 2014—petitioner and respondent offered different accounts of what was said at this meeting.

Respondent testified that his accountant had told him that he could potentially qualify for a tax refund amounting to $100,000. Bankr. Ct. Doc. 66, at 154. Respondent repeatedly stated that, while he informed petitioner of this conversation, he never made a firm representation as to either the amount of the refund or whether he would pay respondent with the proceeds if he ultimately received less than $100,000.

- "[A]t the time of that meeting, I didn't make a promise, because I couldn't promise what I didn't know I was going to get. It hadn't been done yet." *Ibid.*
- Q: "And you did not make a promise to pay a hundred thousand." A: "No, I did not make a promise." *Id.* at 157.

- "[T]he last thing they asked me, 'Now, you're going to pay us with that money?' I looked at both of them and I said, 'Providing that it's what it's supposed to be. If he gets me a hundred, I'll be able to pay you." *Ibid.*

- "I told Mr. Gordon and Mr. Lamar that I don't know what I'm getting back, there's a potential I get 100,000; if I get 100,000 I should be able to pay your bill." Bankr. Ct. Doc. 69, at 41.

Petitioner, through its managing partner Robert Lamar, testified instead that respondent asserted "that the amended return had been prepared, was ready for filing, and that [respondent] would be getting $100,000 back, which he would use to pay their fees " Pet. App. 53a.

In October of 2005, after the IRS had adjusted his return, Appling ultimately received a tax refund of $59,851, less than $100,000. Pet. App. 22a. The parties met again in November 2005. *Id.* at 22a-23a. Their recollections of this meeting differ once more.

Respondent testified that, during this meeting, he told petitioner that he had received a tax refund, but that he would not use it to pay petitioner:

- "I looked at Bob Lamar and I said, 'Well, if I pay you this money, I go out of business.' * * * So if I keep the money, I'll at least have a chance at making what I got stuck with. And I looked at him and I said, 'So I guess I think you know what my decision is going to be.' And my wife and I stood up and we walked out." Bankr. Ct. Doc. 66, at 172.

- Q: "Your testimony is that you told Mr. Lamar in November 2005 that you had gotten your tax return money back." A: "Absolutely. Without a doubt." Bankr. Ct. Doc. 69, at 31.

See also Pet. App. 56a. Respondent's wife "gave testimony that was generally consistent with [respondent's] version." *Ibid.*

But, on behalf of petitioner, Lamar testified that respondent "represented to [petitioner] he had not yet received his refund, and he would use his refund to pay the outstanding legal fees." Pet. App. 23a. Lamar contended that it was not until June 2006 that petitioner learned that respondent would not use his tax refund to pay petitioner. *Id.* at 57a. As the bankruptcy court noted, the parties' recounting of the decade-old conversation "was very different." *Ibid.*

The litigation subsequently settled. Pet. App. 23a. About six years later, in January 2012, petitioner sued respondent in state court for the unpaid fees. *Ibid.* On October 10, 2012, it obtained judgment for $104,179.60, including the principal and accrued interest. *Ibid.* Three months later, Appling filed for bankruptcy. *Ibid.*

C. Proceedings below.

Petitioner pursued respondent into bankruptcy and initiated an adversary proceeding, seeking to have its entire judgment declared non-dischargeable pursuant to Section 523(a)(2)(A). Pet. App. 23a. Petitioner asserted that respondent made misrepresentations about his expected tax refund during their 2005 meetings, and that petitioner justifiably relied on those misrepresentations in foregoing collection between March 2005 and June 2006. *Id.* at 52a-60a.

1. Respondent moved to dismiss for failure to state a claim. See Pet. App. 67a. He contended that the alleged misrepresentations were "statements respecting [his] financial condition," and thus that they could form the basis for an exemption to discharge only if made in writing, as required by Section 523(a)(2)(B). *Id.* at 70a-76a.

The bankruptcy court disagreed. It concluded that the term "statement respecting * * * financial condition" is limited to "a representation as to" a debtor's "overall financial condition or net worth." Pet. App. 73a. Because the "tax refund" is a representation regarding a "single asset," the court held that it does not qualify. *Ibid.*

Respondent also asserted that petitioner failed to allege actual damages, as required by Section 523(a)(2)(A). Pet. App. 79a-81a. The bankruptcy court, however, held that proof of forbearance on the "collection of the fees" is sufficient. *Id.* at 81a.

The case proceeded to trial in September 2014. Pet. App. 46a. In March 2015, the bankruptcy court made factual findings as to the content of the oral conversations between petitioner and respondent that occurred a full decade earlier, in March and November 2005. *Id.* at 52a-60a. The court noted that, to resolve the factual dispute, it "observed the demeanor of the witnesses." *Id.* at 58a. Ultimately, the court did "not believe the testimony of [respondent] and his wife"; it thus credited petitioner's account. *Ibid.*

The district court revisited and again rejected respondent's argument with respect to damages. Pet. App. 62a-66a. Adopting law decided in the context of Section 523(a)(2)(B), the court held that the petitioner's proof of forbearance was sufficient. *Id.* at 66a.

2. On initial appeal, the district court affirmed. Pet. App. 20a-44a. The court held that a statement describing an individual asset or debt is not a "statement respecting the debtor's * * * financial condition." See *id.* at 24a-30a. The court rested on a construction of the term "financial condition." *Id.* at 28a-29a. The court did not define the word "respecting" or consider its meaning in the statute. *Ibid.*

The court also affirmed as to damages. Pet. App. 41a-44a. Citing two cases decided in the context of Section 523(a)(2)(B), the court concluded that "a creditor need not * * * show that he could have collected on the loan prior to the bankruptcy but for the new extension of credit to establish the debt is nondischargeable." *Id.* at 44a (alteration adopted; quotations omitted).

3. The Eleventh Circuit unanimously reversed. Pet. App. 1a-14a. It held that a statement describing a single asset or debt is a "statement respecting the debtor's * * * financial condition," and thus Section 523(a)(2)(B) governs petitioner's claim. *Id.* at 13a-14a. Because the alleged misrepresentations here were not in writing, petitioner's claim fails. *Ibid.*

The court of appeals reasoned that, although "'financial condition' likely refers to the sum of all assets and liabilities," "it does not follow that the phrase 'statement *respecting* the debtor's ... financial condition' covers only statements that encompass the entirety of a debtor's financial condition at once." Pet. App. 8a. Rather, "[r]ead in context," the statutory phrase "includes a statement about a single asset." *Ibid.* Holding otherwise would improperly "read the word 'respecting' out of the statute." *Ibid.*

The court explained that the term "respecting" is "defined broadly as 'with regard or relation to; regarding; concerning." Pet. App. 8a (alteration adopted). Given this plain meaning, "a statement can 'respect' a debtor's 'financial condition' without describing the overall financial situation of the debtor." *Ibid.* The "text," the court concluded, "is not ambiguous." *Id.* at 12a.

The court of appeals added that, beyond being compelled by the text, its construction of the statute is "perfectly sensible" because it "gives creditors an incentive to create writings before the fact" and thus "promotes accuracy and predictability in bankruptcy disputes that often take place years after the facts arose." Pet. App. 13a. The court concluded that the writing requirement "helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty." *Ibid.*

Judge Rosenbaum concurred. Pet. App. 14a-19a. She demonstrated that the court's construction "better promotes congressional intent to give a fresh start to only the 'honest debtor' than does a narrow construction of the same phrase." *Id.* at 14a.

Petitioner did not seek rehearing.

REASONS FOR DENYING THE PETITION

The petition should be denied for at least three reasons: review of the question presented is premature; the decision below is correct; and the question presented does not control the outcome of this case.

A. Review is premature.

Petitioner seeks review of an asserted conflict regarding the meaning of the phrase "statement respecting the debtor's * * * financial condition." Pet.

10-15. Review of this question is premature because no circuit has considered and rejected the argument adopted below. And there is especially good reason to let this issue percolate: this same issue is currently pending in the Fifth Circuit.

In holding that the phrase "statement *respecting* the debtor's ... financial condition" "includes a statement about a single asset," the decision below rested on the plain meaning of the word "respecting." Pet. App. 8a. It acknowledged that the term "financial condition," when standing alone, "likely refers to the sum of all assets and liabilities." *Ibid.* But "'[r]especting' is defined broadly as 'with regard or relation to; regarding; concerning.'" *Ibid.* (alteration adopted). Thus, "a statement can 'respect' a debtor's 'financial condition' without describing the overall financial situation of the debtor." *Ibid.* Construing the term "respecting" was thus crucial.

None of the allegedly conflicting decisions on which petitioner relies gave any consideration to the word "respecting."

Petitioner begins with *Land Investment Club, Inc.* v. *Lauer* (*In re Lauer*), 371 F.3d 406, 413 (8th Cir. 2004). See Pet. 11-12. *Lauer*, however, offered no meaningful construction of the statutory phrase "statement respecting the debtor's * * * financial condition." It did not define *any* term, much less give independent weight to the word "respecting." 371 F.3d at 413-414. And *Lauer* did not announce any clear, broad legal holding of prospective importance.

Lauer is also inapposite because the misrepresentation there was an omission by the debtor. 371 F.3d at 409. The court of appeals here explained that "[S]ection 523(a)(2)(B) requires a 'statement,' as op-

posed to an omission." Pet. App. 11a. Both the Eighth and Eleventh Circuits thus appear to agree that alleged fraudulent omissions are governed exclusively by Section 523(a)(2)(A).

The Tenth Circuit, in *Cadwell* v. *Joelson* (*In re Joelson*), 427 F.3d 700 (10th Cir. 2005), cert. denied 126 S. Ct. 2321 (2006), similarly did not address the meaning of the word "respecting." Instead, the court reasoned that "financial condition" "relates to a debtor's net worth or overall financial condition." *Id.* at 707. The court never considered whether the term "respecting" had impact on the statute's construction.

So too in *Bandi* v. *Becnel* (*In re Bandi*), 683 F.3d 671 (5th Cir. 2012), cert. denied 133 S. Ct. 845 (2013). The court held that the "term 'financial condition' has a readily understood meaning," which is "the general overall financial condition of an entity." *Id.* at 676. But it never considered whether "respecting" effects the proper interpretation of the statutory phrase "statement respecting the debtor's * * * financial condition."

Accordingly, no court has wrestled with the plain meaning of "respecting" and reached the result that petitioner urges. And this Court has consistently denied review of the question presented in the cases preceding this one. Unless and until a sister court of appeals expressly considers and rejects the Eleventh Circuit's reasoning in this case (an outcome we do not anticipate), further review would be premature. Indeed, the lower court's recognition and adoption of a new argument never before considered by the Fifth, Eighth, and Tenth Circuits is precisely the sort of development that the Court should allow to percolate prior to granting review.

Review is especially unwarranted at this time because there is a case pending in the Fifth Circuit that may provide that court an opportunity to revisit *Bandi* in light of the decision below. See *Haler* v. *Boyington Capital Grp., LLC*, No. 17-40229 (5th Cir.). In *Haler*, the lower courts applied *Bandi* to conclude that the debtor's statements regarding single assets were not statements respecting financial condition. See *Haler* v. *Boyington Capital Grp., LLC*, 2017 WL 434357, at *2 (E.D. Tex. 2017). On appeal, the debtor in *Haler* requests that the Fifth Circuit revisit *Bandi* in light of the decision here. See Appellant's Br. at 18-35, *Haler*, 2017 WL 1833075 (5th Cir.) (No. 17-40229).

Before this Court intervenes in this issue, it should await confirmation that a court of appeals will actually reject the analysis adopted below. *Haler* demonstrates that there will be no shortage of vehicles in the event review later becomes appropriate. That is further confirmed by petitioner's assertion that the issue recurs with frequency. Pet. 16-18.

B. The decision below is correct.

Review is also unwarranted because the Eleventh Circuit's interpretation of the statute is correct. That construction is compelled by the plain meaning of the statutory text, the manifest legislative purpose, and the statute's history.

1. The statutory text.

The "interpretation of the Bankruptcy Code starts where all such inquiries must begin: with the language of the statute itself." *Ransom* v. *FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (quotations omitted). When, as here, "the statute's language is plain," "that is also where the inquiry should end." *Puerto*

Rico v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (quotations omitted).

Petitioner—like the Fifth and the Tenth Circuits—focuses on the term "financial condition." See Pet. 19. See also *Bandi*, 683 F.3d at 674-678; *Joelson*, 427 F.3d at 706-707. Petitioner asserts that the term means "the balance of all of the debtor's assets and liabilities." Pet. 19. The Fifth Circuit likewise held that the term "financial condition" must refer to "the general overall financial condition of an entity or individual, that is, the overall value of property and income as compared to debt and liabilities." *Bandi*, 683 F.3d at 676. See also *Joelson*, 427 F.3d at 706-707.

This analysis, however, fails to account for the whole statute, especially the word "respecting." As the Eleventh Circuit below recognized, "even if 'financial condition' means the sum of all assets and liabilities, it does not follow that the phrase 'statement *respecting* the debtor's ... financial condition' covers only statements that encompass the entirety of a debtor's financial condition at once." Pet. App. 8a. When "[r]ead in context, the phrase 'statement *respecting* the debtor's ... financial condition' includes a statement about a single asset." *Ibid.* A conclusion otherwise would "read the word 'respecting' out of the statute." *Ibid.*

To begin with, there is a "duty to give effect, where possible, to every word of a statute," particularly when the word "occupies so pivotal a place in the statutory scheme." *Duncan* v. *Walker*, 533 U.S. 167, 167, 168 (2001). Here, that obligates the Court to give effect to the word "respecting." Congress could have written the statute to turn on a "statement *of* financial condition" or "statement *describing* financial condition." Its decision to use the term "respect-

ing"—a word with long-recognized meaning—cannot be considered accidental.

As petitioner appears to recognize (Pet. 19-20), the word "respecting" means "with regard or relation to: regarding, concerning." *Webster's Third New International Dictionary* 1934 (1981). See also *Webster's New Twentieth Century Dictionary* 1542 (2d ed. 1967) ("concerning; about; regarding; in regard to; relating to"); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 649 (1989) (Stevens, J., concurring in part, dissenting in part) (interpreting "respecting" to mean "concerning, or with reference to").

In *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971), the Court construed the First Amendment clause that there "should be 'no law respecting an establishment of religion.'" As the Court explained, "[a] law may be one 'respecting' the forbidden objective while falling short of its total realization." *Ibid.* Thus, in the context of the Religion Clause, "[a] given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." *Ibid.* Likewise, in *Presley* v. *Etowah County Commission*, 502 U.S. 491, 506, (1992), the Court interpreted the cognate "with respect to" to mean "direct relation to, or impact on."

Given this definition, the phrase "statement respecting * * * financial condition" has a straightforward meaning. It captures any statement that has a "direct relation to" or an "impact on" (*Presley*, 502 U.S. at 506) the "balance of all of the debtor's assets and liabilities." Pet. 19.

Contrary to petitioner's assertion (Pet. 20), the practical implications of this construction are anything but "indeterminate." As petitioner sees it, a "financial condition" is the "sum" of the debtor's assets and liabilities. Pet. 19 (citing 11 U.S.C. § 101(32)(A)). Petitioner even provides a formula to calculate the debtor's "financial condition"—"the equality of total assets to total liabilities plus net worth." *Ibid.* Our argument—adopted by the court of appeals—is that a statement describing one of the constituent elements that is summed together counts as a "statement *respecting* * * * financial condition." Pet. App. 9a. Thus, a "statement about a single asset is still a statement *respecting* a debtor's financial condition." *Ibid.*[1]

Petitioner, by contrast, fails to ascribe any meaning to the term "respecting." Pet. 20-21. Despite recognizing that the term "has breadth in the abstract" (Pet. 20), petitioner offers no explanation for what work the word does in the statute. In fact, petitioner appears to recognize that it seeks an atextual interpretation, framing its argument in the main as one

---

[1] For this reason, petitioner is wrong to assert that the court of appeals' construction would render "virtually every statement" one that is "respecting * * * financial condition" and thus covered by subsection (2)(B) rather than subsection (2)(A). Pet. 22. As the Eleventh Circuit held, under its constriction, "Section 523(a)(2)(A) covers most fraud." Pet. App. 11a-12a. Referencing case law of the Fourth Circuit—where this construction has governed for more than three decades—the court of appeals recognized "a list of examples" of debts "incurred by an oral misrepresentation that [are] not 'respecting the debtor's financial condition'" and thus were "nondischargeable under subsection (A)." *Id.* at 12a. This includes "false representations about job qualifications and lies about the purpose and recipient of a payment." *Ibid.*

driven by policy concerns that, in its view, would sway "[e]ven the most ardent textualists." Pet. 22. Petitioner's failure to wrestle with the word "respecting" is hardly surprising—neither the Fifth nor the Tenth Circuits gave any meaning to the word, either.

Petitioner instead asserts that the term "respecting" should be disregarded because applying its established definition to the phrase "statement respecting * * * financial condition" would "override or change the meaning of 'financial condition.'" Pet. 20. This argument is difficult to understand. Of course one word or phrase in a statute may "override or change the meaning of" another word—that is often the very purpose of prepositions, adjectives, adverbs, and a host of other linguistic devices. The task here is to interpret the meaning of the entire phrase that Congress enacted—"statement respecting the debtor's * * * financial condition." It is no answer to define what "financial condition" means when standing alone, and then close one's eyes to the remainder of the statutory language.

Indeed, the Court has repeatedly rejected efforts—like petitioner's argument here—to disregard Congress's use of prepositions with "breadth in the abstract." Pet. 20. In *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (emphasis added), the Court considered the Airline Deregulation Act (ADA), which preempts state laws "*relating to* rates, routes, or services of any air carrier."[2] Seeking

---

[2] In the court of appeals, petitioner conceded that "relating" would have "identical effect" to the term "respecting." Pet. C.A. Br. 22. That concession is well-founded, as they are synonyms. See *Respecting*, *Webster's Third New International Dictionary* 1934 (1981).

to regulate airline advertising, the states argued that the ADA "only pre-empts the States from actually prescribing rates, routes, or services." *Morales*, 504 U.S. at 385. The Court rejected that contention because it "simply reads the words 'relating to' out of the statute." *Ibid.* "[T]he key phrase, obviously, is 'relating to.'" *Id.* at 383. Any state law that has "a significant impact upon" airlines rates, the Court concluded, "relates to" those rates and is thus preempted. *Id.* at 389, 390. Of course, not *everything* can be said to relate to airline rates: if the connection is "too tenuous, remote, or peripheral," then it does not "relate to" airline rates and thus there is no preemption. *Id.* at 388, 390.

Morales relied, in part, on the Court's ERISA jurisprudence, which also uses the term "relating to." *Id.* at 383-384. In that context, the Court has repeatedly explained the importance of the term, calling statutes using this preposition "deliberately expansive" (*Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987)), "broadly worded" (*Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138 (1990)), "conspicuous for its breadth" (*FMC Corp.* v. *Holliday*, 498 U.S. 52, 58 (1990)), and evincing an "expansive sweep" (*Pilot Life Ins. Co.*, 481 U.S. at 47).

Petitioner also invokes a supposed canon of construction that "the Court's typical practice is '[to] read the exception narrowly in order to preserve the primary operation of the provision.'" Pet. 21. Thus, petitioner contends that subsection (2)(B), as an exception to (2)(A), should be construed narrowly. *Ibid.* This gets it precisely backwards because subsection (2)(A) is *itself* an exception to the Bankruptcy Code's broad policy of discharge. Section 523(a)(2)(A) is thus narrowly construed, consistent with the "the long-

standing principle that exceptions to discharge should be confined to those plainly expressed." *Bullock* v. *BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013) (quotations omitted).[3] Subsection (2)(B) is, by contrast, an exception-to-the-exception.

Because petitioner's argument rests on an atextual construction that asks the Court to disregard Congress's use of the term "respecting," review is unwarranted. And, as we said earlier, review should certainly wait until other courts of appeals have opportunity to opine on the meaning of the term "respecting" as used in this statute.

2. The legislative purpose.

The legislative purpose confirms the conclusion that "statement respecting the debtor's * * * financial condition" encompasses statements describing a single asset or debt. This construction promotes predictability and accuracy while protecting honest debtors from abusive credit practices. Petitioner's interpretation of the statute would, by contrast, frustrate Congress's express goals.

a. The Eleventh Circuit's construction of the statutory phrase "promotes accuracy and predictability in bankruptcy disputes that often take place years after the facts arose." Pet. App. 13a.

---

[3] Petitioner asserts—and will undoubtedly reiterate in reply—that the Court sometimes qualifies its statements regarding the policy underlying bankruptcy discharge as providing opportunity for the "honest but unfortunate debtor." *Local Loan*, 292 U.S. at 244. But, as Judge Rosenbaum's concurring opinion underscores, the court of appeals' construction "better promotes congressional intent to give a fresh start to only the 'honest debtor.'" Pet. App. 14a. See also *infra*, 21-24.

Congress "designed" the Bankruptcy Code to provide "predictability" in bankruptcy proceedings. *Schwab* v. *Reilly*, 560 U.S. 770, 790 (2010). Because "[p]ractical, economical and expeditious administration and the avoidance of unnecessary and costly litigation" is an important goal (*Cent. Tr. Co.* v. *Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354, 361 n.3 (1982) (Stevens, J., dissenting)), the Court should favor interpretations of the Bankruptcy Code that "enhance[] predictability for interested parties." *Mwangi* v. *Wells Fargo Bank, N.A.* (*In re Mwangi*), 764 F.3d 1168, 1176 n.4 (9th Cir. 2014).

Interpreting the phrase "statement respecting financial condition" to encompass statements about single assets and debts has the effect of placing more representations in the category of Section 523(a)(2)(B), which requires written representations—and concomitantly fewer representations in the category of Section 523(a)(2)(A), which applies to written and oral statements alike. Thus, this interpretation encourages creditors to rely on written statements. This furthers accuracy and predictability in two main ways.

First, written statements are typically more reliable. See *Joelson*, 427 F.3d at 707 (observing that an oral statement "is often informal and spontaneous" and thus more likely to be unreliable). When a debtor is required to commit a representation to writing—and often must sign that instrument—a debtor will typically be more precise and complete in his or her representations. As the court of appeals explained, "providing an incentive for creditors to receive statements in writing may reduce the incidence of fraud." Pet. App. 13a-14a.

Second, written statements create a record that permits predictable and efficient dispute resolution. In the course of a bankruptcy, parties often dispute the particulars of transactions that occurred years—if not decades—earlier. The malleability of oral representations makes dispute resolution so far removed in time exceedingly burdensome and error-prone.

Here, for example, the bankruptcy court heard conflicting testimony in September 2014 about oral statements made nearly a decade earlier, in March 2005. See Pet. App. 2a-3a. The parties vigorously disputed who said what ten years prior. See, *supra*, 4-6. To resolve the dispute, the bankruptcy court resorted to the "demeanor of the witnesses," its own back-of-the-envelope financial calculations, and its intuition about respondent's motivation for seeking bankruptcy advice. Pet. App. 58a. Such archeology is a fraught enterprise: not only do memories fade with time, but debtors and creditors will have drastically different incentives that will inevitably color their recollections.

Congress created a simple solution. If a creditor wishes to rely on a statement respecting the debtor's finances as a basis to later seek an exemption from bankruptcy discharge, that statement must be made in writing. Then, if a debtor declares bankruptcy years (or decades) later, there can be no dispute as to the content of the statement itself.

As the Eleventh Circuit observed, "the requirement of a writing is not at all unusual in the history of the law." Pet. App. 13a. "From the Statute of Frauds to the Uniform Commercial Code, law sometimes requires that proof be in writing as a prerequisite to a claim for relief." *Ibid.* While "[t]his require-

ment may seem harsh after the fact," "it gives creditors an incentive to create writings before the fact, which provide the court with reliable evidence upon which to make a decision" *Ibid.*

Petitioner, as it did below, fears that this creates a "loophole" in the scope of Section 523(a)(2)(A). Pet. 21-22. Not so. "[A] lender concerned about protecting its rights in bankruptcy can easily require a written statement from the debtor before extending credit." Pet. App. 13a. That is particularly true here because "[petitioner], a law firm, could have required [respondent] to put his promise * * * in writing." *Ibid.* The writing requirement is thus "perfectly sensible." *Ibid.*

At bottom, the broad construction "helps both the honest debtor prove his honesty and the innocent creditor prove a debtor's dishonesty." Pet. App. 13a.

b. Separately, as Judge Rosenbaum's concurring opinion demonstrates, the broad construction "better promotes congressional intent to give a fresh start to only the 'honest debtor.'" Pet. App. 14a.

As petitioner appears to recognize (Pet. 22), Congress enacted safeguards in Section 523(a)(2)(B) to bar predatory practices by some abusive creditors. Congress sought to stem "the peculiar potential of financial statements to be misused not just by debtors, but by creditors who know their bankruptcy law." *Field*, 516 U.S. at 76. It sought to "moderate the burden on individuals who submitted false financial statements, not because lies about financial condition are less blameworthy than others, but because the relative equities might be affected by practices of consumer finance companies." *Ibid.*

Congress detailed the kind of improper practices it sought to eliminate. Creditors "sometimes have encouraged * * * falsity by their borrowers for the very purpose of insulating their own claims from discharge." *Field*, 516 U.S. at 76-77. In particular, Congress recognized the "frequent practice for consumer finance companies to take a list from each loan applicant of other loans or debts that the applicant has outstanding." *Id.* at 77 n.13 (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 130-131, 1978 U.S.C.C.A.N. 5787, 6091 (1977)). Unsavory creditors provided forms that had "too little space for a complete list of debts." *Ibid.* The loan applicant may have been "instructed by a loan officer to list only a few or only the most important of his debts." *Ibid.* But, on "the bottom of the form, the phrase 'I have no other debts' is either printed on the form, or the applicant is instructed to write the phrase in his own handwriting." *Ibid.*

To stop these practices, Congress crafted the safeguards contained in Section 523(a)(2)(B). In order to use information a debtor supplies "respecting" his or her "financial condition" as a later basis to exempt debt from discharge, a creditor must obtain that information in writing (11 U.S.C. § 523(a)(2)(B)), and it must prove that it "reasonably" relied on the representation (*id.* § 523(a)(2)(B)(iii)). The written requirement creates accuracy from the start and prevents abuse at the end (see, *supra*, 18-21), while the reasonable reliance requirement precludes creditors from seeking an exemption from discharge when a creditor made an obvious misstatement, on which no reasonable creditor would rely.

Interpreting "statement respecting financial condition" to include statements describing single debts

or assets ensures that a greater range of representations are protected by Section 523(a)(2)(B)—the precise result that Congress intended. Pet. App. 18a-19a (Rosenbaum, J., concurring).

Petitioner appears to recognize all of this, but nonetheless asserts that the construction below "expands the scope of the 'financial condition' exception far beyond the particular problem targeted by Congress." Pet. 22-23. That is wrong for at least two reasons.

First, the very abusive practice Congress identified—where a debtor is asked to list some outstanding debts (H.R. Rep. No. 595, 95th Cong., 1st Sess. 130-131)—is captured only by the construction of the phrase we urge. A list of the borrower's *debts* typically does not reveal her "*overall* financial condition," because it says nothing about her assets or income. Thus, petitioner's argument yields the dubious result where the example that Congress provided as the justification for the statute is excluded from what qualifies as a "statement respecting the debtor's * * * financial condition."

Second, petitioner's construction would render subsection (2)(B) a porous statute that would fail to protect debtors in the way that Congress intended. Under petitioner's interpretation, a creditor could carefully tailor its questions to ask a debtor everything *but* her ultimate net worth. Through such gerrymandering, any institutional creditor could purposefully skirt the safeguards that Congress put in place. That is not the law Congress wrote. By using the word "respecting," Congress sought to apply the protections of Section 523(a)(2)(B) to all debtor representations relating to financial conditions—and to

preclude creditors from circumventing those safeguards.

Concurring below, Judge Rosenbaum debunked petitioner's assertion that its construction would further the policy of protecting the "honest but unfortunate debtor." Pet. 21. "Though a narrow construction of the phrase in subsection (A) seems to further congressional intent to protect only the 'honest debtor,'" Judge Rosenbaum explained that "[s]ometimes things are not as they seem." Pet. App. 14a. Rather, "a broad interpretation of the phrase in subsection (B) better comports with congressional intent." Pet. App. 14a-15a. That is because "the reality is that a broad construction of the phrase 'statement respecting ... the debtor's financial condition' in subsection (B) advances congressional intent to provide relief for only the 'honest debtor' more than a narrow interpretation of the same phrase in subsection (A)." *Id.* at 15a.

3. The statutory history.

Finally, the statutory history confirms that a debtor's representation regarding a single asset or debt qualifies as a "statement respecting financial condition."

Congress recodified the Bankruptcy Code in 1978 to create the current version of Section 523(a)(2). See Pub. L. No. 95-598, 92 Stat. 2549 (1978). But the term "statement respecting financial condition" dates significantly earlier.

In 1926, Congress amended what was then Section 14b(3) of the Bankruptcy Code. See Act of May 27, 1926, § 6, 44 Stat. 662, 663. That newly-amended provision barred debtors from obtaining a bankruptcy discharge at all if they had "[o]btained money or

property on credit * * * by making or publishing * * * a materially false statement in writing respecting his financial condition." 11 U.S.C. § 32b(3) (1926).

In 1960, Congress further amended the statute. Rather than serve as a complete bar to discharge, the amended statute provided that a debtor could not discharge those liabilities obtained by "reliance upon a materially false statement in writing respecting his financial condition." See Pub. L. No. 86-622, 74 Stat. 409 (1960).

So far as we are aware, courts *uniformly* understood this language in the 1926 and the 1960 Acts to encompass a debtor's representations regarding a single asset or debt.

For example, in 1945, the Sixth Circuit construed the statute precisely as the Eleventh Circuit did here. "No cases have been cited to us, and none has been found by careful examination, which confines a statement respecting one's financial condition as limited to a detailed statement of assets and liabilities." *Albinak* v. *Kuhn*, 149 F.2d 108, 110 (6th Cir. 1945). The court rejected the contention that the relevant phrase narrowly encompasses only "a complete statement of assets and liabilities by which the precise financial worth of the person making the statement can be determined." *Ibid.* "[T]he statute does not use the phrase 'financial statement.'" *Ibid.*

In 1967, the Eighth Circuit reached the same conclusion. It found that "[a] written statement purporting to set forth the true value of a major asset of a corporation, its inventory, is a statement respecting the financial condition of that corporation." *Shainman* v. *Shear's of Affton, Inc.*, 387 F.2d 33, 38 (8th Cir. 1967). The court reasoned that "[t]here is

nothing in the language or legislative history of this section of the Act to indicate that it was intended to apply only to complete financial statements in the accounting sense." *Ibid.*

A Louisiana appellate court agreed. "The bankruptcy act does not speak of a 'financial statement' in the sense of a formal listing and detailing of assets and liabilities." *Dial Fin. Co.* v. *Duthu*, 188 So. 2d 151, 154 (La. Ct. App. 1966). "Insofar as concerns the Federal Bankruptcy Act a 'statement in writing respecting his financial condition' means any written reference to the assets or liabilities of the debtor." *Ibid.* That a statement describing an asset or debt "is not a part of a complete listing of assets and liabilities is immaterial." *Ibid.*

For decades, courts held similarly. See, *e.g.*, *Tenn* v. *First Hawaiian Bank*, 549 F.2d 1356, 1357-1358 (9th Cir. 1977) (concluding that an individual deed—despite saying nothing about a debtor's liabilities or overall net worth—qualified as a "statement * * * respecting * * * financial condition"); *In re Butler*, 425 F.2d 47, 49 (3d Cir. 1970) (holding that a corporation's false statements as to select accounts receivable qualified as "statements * * * respecting * * * financial condition").

When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 n.66 (1982) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978)). Indeed, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it

re-enacts a statute without change." *Lorillard*, 434 U.S. at 580.

That presumption takes on special force here, where the history indicates Congress acted with express intent to codify pre-existing law. The Report of the House Committee on the Judiciary noted that "[Section] 523(a)(2)(A) and (B) was 'modified only slightly' from its predecessor, and none of the modifications noted by the Committee impact the meaning of 'respecting the debtor's ... financial condition.'" *Joelson*, 427 F.3d at 709 (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 364). See also S. Rep. No. 989, 95th Cong., 2d Sess. 78 (1978). And a member of the House introduced the amendment by stating that it "is intended to codify current case law." *Joelson*, 427 F.3d at 709 (quoting 124 Cong. Rec. H11089 (Sept. 28, 1978) (statement of the Hon. Don Edwards)).

At the time Congress enacted Section 523(a)(2), the phrase "statement respecting * * * financial condition" had long been interpreted to include statements describing a single asset or debt. Congress's retention of this language is thus ratification of the consistent construction.

C. This is a poor vehicle for review.

This case is a poor vehicle for review because resolution of the question presented is unlikely to have any bearing on its ultimate outcome.

Petitioner seeks to have its claim governed by Section 523(a)(2)(A). If Section 523(a)(2)(A) did apply, respondent would nonetheless prevail because petitioner has failed to prove the necessary element of damages. See Resp. C.A. Br. 29-33; Resp. C.A. Reply Br. 21-29.

Section 523(a)(2)(A) "incorporate[s] the general common law of torts." *Field*, 516 U.S. at 70 n.9. One such element is proof of "pecuniary loss resulting from" the misrepresentation. Restatement (Second) of Torts § 537 (1977). See also *In re Johannessen*, 76 F.3d 347, 350 (11th Cir. 1996).

Here, the debt at issue is money that respondent owed petitioner *prior to* respondent's making of the representations at issue. See Pet. 4-5. The record demonstrates that petitioner "extended no new net value after [respondent's] false statement in March 2005." Pet. App. 43a. In fact, petitioner, via its managing partner, *admitted* as much. Bankr. Ct. Doc. 66, at 100 (testimony of Robert Lamar that, after the March 2005 meeting, "we worked for 20-something thousand, we got paid 25,000 and the debt that was sitting out there accruing interest was not getting reduced at all for that period of time"). Thus, new money was not lent in reliance on respondent's asserted statements. At most, petitioner agreed to forbear on its collection efforts.

To be clear, we do not dispute that a creditor's decision to forbear on debt collection can establish an actionable claim of damages for subsection (2)(A). But, to substantiate such a theory, the creditor must prove that (1) "it had valuable collection remedies at the time of the misrepresentation," (2) "it did not exercise those remedies based upon the misrepresentation," and (3) "that the remedies lost value during the extension period." *Ojeda* v. *Goldberg*, 599 F.3d 712, 719 (7th Cir. 2010). See also *In re Kim*, 163 B.R. 157, 161 (B.A.P. 9th Cir. 1994), *adopted by In re Kim*, 62 F.3d 1511 (9th Cir. 1995); *Shah* v. *Chowdaury* (*In re Chowdaury*), 2014 WL 2938274, at *4 (B.A.P. 9th

Cir. 2014); *Locke* v. *Milner* (*In re Locke*), 205 B.R. 592, 598 (B.A.P. 9th Cir. 1996).

Here, however, petitioner never argued—much less proved—that it had valuable collection remedies in March or November 2005 or that those remedies lost value during the period of forbearance. Instead, petitioner argued—and the bankruptcy court agreed—that "'[a] creditor need not also show that he could have collected on the loan prior to the bankruptcy but for the new extension of credit' to establish the debt is nondischargeable." Pet. App. 44a. See also Pet. App. 64a-66a, 80a-81a.

To arrive at that conclusion, the bankruptcy court rested on two decisions—*Wolf* v. *Campbell* (*In re Campbell*), 159 F.3d 963, 966 (6th Cir. 1998), and *Shawmut Bank, N.A.* v. *Goodrich* (*In re Goodrich*), 999 F.2d 22, 25 (1st Cir. 1993). But those cases arose in the context of Section 523(a)(2)(B)—and they are obviously inapplicable if petitioner's argument is one pursuant to Section 523(a)(2)(A).

In *Goodrich*, the First Circuit reasoned that Section 523(a)(2)(B) "is quite detailed in its conditions for nondischargeability." 999 F.2d at 25. Since "Congress enacted a detailed statute without an explicit damage requirement," the Court concluded that Section 523(a)(2)(B) does not require proof of damages. *Id.* at 26. "Had Congress wished to add 'damage' as an element, it could easily have done so." *Id.* at 25. The Sixth Circuit later agreed. *Campbell*, 159 F.3d at 967.[4]

---

[4] There is a circuit split on this issue in the context of subsection (2)(B). The Ninth Circuit, along with other courts, has held that proof of damages is a necessary element for that subsec-

Whatever force this reasoning has with respect to subsection (2)(B), it clearly does not apply to subsection (2)(A), which does not enumerate its elements. Subsection (2)(A) instead "incorporate[s] the general common law of torts" (*Field*, 516 U.S. at 70 n.9), which includes proof of damages. The bankruptcy's decision to the contrary is blatant error. Petitioner's failure to prove up its damages thus forecloses its claim, even if governed—as petitioner argues here—by Section 523(a)(2)(A).

Because petitioner's claim fails regardless whether it is controlled by Section 523(a)(2)(A) or Section 523(a)(2)(B), further review is unwarranted.

CONCLUSION

The petition should be denied.

Respectfully submitted.

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
JONATHAN WEINBERG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Respondent

MAY 2017

---

tion. See *Siriani* v. *Nw. Nat'l Ins. Co.* (*In re Siriani*), 967 F.2d 302, 305 (9th Cir. 1992).